



Paper No. 15

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In re Patent No. 5,891,260 :
Issue Date: April 6, 1999 :
Application No. 08/795,038 :
Filed: February 5, 1997 :
Title of Invention: PRODUCT RECOVERY :
SYSTEM :

OFFICE OF PETITIONS

ON PETITION

This is a decision on the petition filed under 37 CFR 1.378(e), August 25, 2003, requesting reconsideration of a prior decision which refused to accept under § 1.378(b) the delayed payment of the first maintenance fee for the above-referenced patent.

The petition is **dismissed**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR § 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR § 1.136(a) or (b). No further fee is due for seeking reconsideration. If petitioner does not reply within the time period set, the decision will be based upon the administrative record to date.

The patent issued April 6, 1999. Accordingly, the first maintenance fee due could have been paid during the period from April 6, 2002 through October 6, 2002 or with a surcharge during the period from October 7, 2002 through April 6, 2003. This patent expired on April 7, 2003.

A petition under 37 CFR 1.378(b) to accept late payment of the maintenance fee was filed on July 30, 2003 and was dismissed in a decision mailed August 13, 2003.

The instant petition under 37 CFR 1.378(e) requesting reconsideration of the decision of August 13, 2003 was filed on August 25, 2003. The petition provides detailed information concerning the unfortunate technical issues experienced regarding the computer system relied upon for the notification and payment of maintenance fees. The chronology includes the period from April 10, 2002 through October 10, 2002 which incidentally coincides with the period of time within which the maintenance fees could have been paid without a surcharge. Petitioner further explains that a physical audit was conducted of the scheduled payment of maintenance fees for all patents and trademarks around June 30, 2003.

The explanation suggests that the computer issues lasted for approximately six months. Even in view of the computer issues that began around April 2002, petitioners did not conduct a physical audit of scheduled maintenance fee payments until at least eight months later. The evidence further suggests that the computer issues appear to have been resolved by October 10, 2002.

Petitioner has still not shown diligence in either preventing the issues that ultimately lead to the computer breakdown, or diligence in having a back up system in the event of a

possible computer breakdown to ensure that all maintenance fees would be timely paid. Additionally, in light of the existing computer problems, petitioner has not shown any evidence to justify the delay in conducting the physical audit more than eight months after October 2002. Surely in April 2002, even without the computer system, petitioner had to know that maintenance fees had to be due on some patents, even without knowing specifically which ones were due. A physical audit of scheduled maintenance fees between April and October 2002 would have revealed that the maintenance fee on the above identified patent was due and would have allowed petitioner to make the payment even without a surcharge being due.

Further, even with a surcharge, this patent could have been prevented from expiring if reasonable care had been exercised from the period October 11, 2002 through April 6, 2003.

The showings supplied with the renewed petition, and those previously of record, only speak to steps taken subsequent to the expiration of the instant patent, which are relevant to the required showing under the rule of the steps taken to file a petition promptly after the expiration of this patent. However, any petition seeking reinstatement must also enumerate, under the rule, the steps that were taken to ensure timely payment of the maintenance fee, which must necessarily be steps taken *prior* to the expiration of the patent. See 37 CFR 1.378(b)(3); MPEP 2590.

In summary, the showing of record has been considered, but does not rise to the level of unavoidable delay. Rather, the showing of record is of a lack of diligence on the part of petitioner. Petitioner has presented no indication that any steps were taken to ensure timely payment of the maintenance fee. Petitioner apparently made no provisions to ensure timely payment of the maintenance fee.

Since petitioner has still not shown unavoidable delay the petition will be dismissed again. Petitioner may wish, in the alternative, to request reconsideration in the form of a petition under 37 CFR 1.378(c), requesting that the unintentionally delayed payment of a maintenance fee be accepted. The additional surcharge due in this instance would be \$940.00.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. 41© and 37 CFR 1.378© must be filed within twenty four months from the end of the six month grace period (e.g., the expiration date of the patent and be accompanied by (1) a verified statement that the delay was unintentional, (2) payment of the appropriate maintenance fee, unless previously submitted, (3) payment of the \$1,640.00 surcharge (the \$700.00 surcharge already paid may be credited thereto leaving a balance due of \$940.00) set forth in 37 CFR 1.20(I)(2). The statement can be verified by using the attached petition form which includes a declaration according to 37 CFR 1.68.

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the patent was expired until the filing of the petition to reinstate under 37 CFR 1.378(c), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.378(c).

Further correspondence with respect to this matter should be addressed as follows:

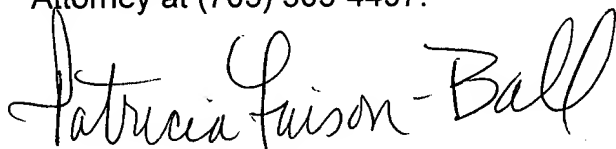
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Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (703) 305-4497.

A handwritten signature in cursive script that reads "Patricia Faison-Ball". The signature is written in dark ink and is positioned above the printed name and title.

Patricia Faison-Ball
Senior Petitions Attorney
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